Supreme Court, U.S.
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No. 14-571

In the Supreme Court of the United States

APRIL DEBOER, *et al.*,
Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL COALITION OF BLACK PASTORS AND CHRISTIAN LEADERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

This case is about the protection of a State's right to define marriage as a union between a man and woman. The Sixth Circuit analyzed the constitutionality of marriage amendments passed by the vast majority of voters in Michigan,[1] Kentucky,[2] Ohio,[3] and Tennessee,[4] and decided not to overrule a decision reflecting the beliefs of approximately twenty-two million Americans in those states.[5]

The ultimate questions before the Court are whether a Court can force a State to redefine marriage and whether refusing to redefine marriage denies homosexual individuals a "fundamental right" to marry.

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[1] Fifty-nine percent of Michigan voters approved the traditional definition of marriage. App. 16.

[2] Seventy-four percent of Kentucky voters approved their State's definition of marriage. App. 18.

[3] Sixty-two percent of Ohio voters supported Ohio's definition of marriage. App. 19.

[4] Eighty percent of Tennessee voters approved their definition of marriage. App. 21.

[5] The Sixth Circuit estimated that the population of Kentucky, Michigan, Ohio, and Tennessee totaled thirty-two million. App. 15. The average voter approval for the tradition definition of marriage in those states totals almost sixty-nine percent. *See* App. 16, 18, 19, 21.

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OTHER AUTHORITIES

Dent, G.W., Jr., Straight is Better: Why Law and Society May Justly Prefer Heterosexuality, 15 Tex. Rev. L. & Pol. 359 (2011) 12, 13, 14, 20

M. Gallagher, Why Marriage Matters: The Case for Normal Marriage, available at http://marriage debate.com/pdf/ SenateSept42003.pdf 13

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Charles de Montesquieu, Montesquieu's Considerations on the Causes of the Grandeur and Decadence of the Romans (Jehu Baker trans., Tiberius 1882) 15

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, National Coalition of Black Pastors and Christian Leaders, respectfully submit this brief requesting that the Court uphold the traditional definition of marriage as constitutional.[6]

Amici represent the interests of over 25,000 Ministries/Churches that include over 3 million laity. *Amici* devote their lives to America's time-honored family values. *Amici* lead their pastoral communities, preach, and spread the good news of God's love. As pastors, *Amici* are considered to be shepherds who guide their church communities in accordance with the Bible. *Amici* believe that the Bible defines what constitutes sound doctrine, not the culture, gender, or personality. *Amici* bear the responsibility to oppose unsound doctrines and to oppose practices that are harmful to the following of God's teachings. Therefore, *Amici* have a vested interest in a State being able to define marriage to secure the sanctity of the traditional family, as it is defined by God in the Bible.

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[6] Petitioners and Respondents have granted blanket consent for the filing of *amicus curiae* briefs in this matter. Pursuant to Rule 37(a), *Amici* gave 10-day notice of their intent to file this *amicus curiae* brief to all counsel. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Over the past year, the issue of State marriage redefinition has been aggressively wrestled onto the national stage. *Amici* have submitted several amicus briefs across the country, including in *DeBoer v. Synder*, App. 1-102; *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir. 2015), *cert. denied* 135 S. Ct. 265 (Oct. 6, 2014); *Rainey v. Bostic*, 760 F.3d 352 (4th Cir. 2014), *cert. denied* 135 S. Ct. 286 (Oct. 6, 2014), and *Robicheaux v. Caldwell*, No. 14-31037 (5th Cir.).

Amici hold a strong interest in the protection of marriage nationally and therefore hold a strong interest in seeing traditional marriage upheld in the Sixth Circuit. When a federal court properly upholds a duly enacted State law that protects the sanctity of marriage and the family, *Amici* have the responsibility of supporting such a decision and leading their community to follow. *Amici* respectfully submit this brief requesting that the Court uphold the long-recognized constitutionality of marriage defined by the States.

SUMMARY OF THE ARGUMENT

The Constitutions and marriage laws of Michigan, Kentucky, Tennessee, and Ohio do not serve a discriminatory purpose. The State Constitutions and marriage laws affirm the definition of marriage—a union of one man and one woman. Mich. Const. art. I, § 25; Ky. Const. § 233A; Ohio Const. art. XV, § 11; Tenn. Const. art. XI, § 18. It is the right of each State's voters to codify the long-standing definition of marriage as between a man and woman. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the

States") (*quoting Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

As Christian pastors, *Amici* know that all human beings have inherent value because God created every person in His image. Thus, it is *Amici*'s position that the government should never classify or discriminate against another human being based on who they are. A person's sexuality and sexual preferences, however, are *not* their state of being, or even an immutable aspect of who they are, as race is. The truth is that sexual conduct is an activity. For *Amici*, truth matters.

A State has no responsibility to promote any person's sexual proclivities, whether heterosexual, homosexual, or otherwise—and certainly is not required to accept that one's sexual conduct preference is the same as an immutable characteristic like race. Government may not regulate people based on who they are, but it may regulate their conduct, including sexual conduct. Even more germane to this case is the principle that government need not—and, indeed, may not—force its citizens to promote a type of sexual behavior to which its citizens object.

This brief addresses three reasons why this Court should either grant this Petition and uphold the Sixth Circuit's correctly decided opinion, or decline to hear this Petition. First, the Sixth Circuit properly applied the reasoning behind the landmark case of *Loving v. Virginia*. App. 31. The Sixth Circuit refused to apply faulty logic that the holding of *Loving v. Virginia* should be extended to mean that a fundamental right exists for individuals to marry any other person(s) of their choice. App 46-50. Second, the Sixth Court properly applied Respondents' arguments that law

should be based upon our Nation's Constitution, adopted pursuant to our history and traditions, rather than the current whims of certain parties or judges. App. 14, 31, 32. Third, Petitioners erroneously claim that the Sixth Circuit failed to adequately consider the contentious and inconclusive factual record of the trial court concerning "optimal child outcomes." App. 15-16, 26-27.

Petitioners assert that State-approved marriage violates the Due Process and Equal Protection Clauses. App. 17. It does not. The Sixth Circuit Court's opinion explains this in an exceptionally thorough and well-reasoned analysis. App. 1-102. Petitioners ask this Court to reject the Sixth Circuit Courts' correct assessment of our Nation's federal tradition, history, and morality. Pet. at 10, 14, 18-19. In doing so, Petitioners ask this Court to supplant the convictions of State voters, and the morality and social structure on which our nation was built, with the Petitioners' moral relativism.

In no uncertain terms, Petitioners seek for this Court to commit an act of judicial overreach, aggrandize the power of a limited federal judiciary, and diminish the power of the States. This Court should decline Petitioners' invitation.

ARGUMENT

I. *LOVING v. VIRGINIA* DOES NOT REQUIRE MARRIAGE REDEFINITION.

The Equal Protection Clause holds special significance for Black Americans. The text of the Fourteenth Amendment guarantees that "no state shall ... deny to any person within its jurisdiction equal

protection of the laws." U.S. Const., amend. XIV, § 1. When the Equal Protection Clause became law in 1868, many Black Americans were recently emancipated slaves. Four years later in 1872, the Supreme Court suggested that race discrimination was "the evil [the Civil War Amendments] were designed to remedy," *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) ("We do not say that no one else but the negro can share in [their] protection, but ... in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy."). It took nearly a century after the Civil War for the Supreme Court to enforce a modicum of what we now know as substantive equality. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Comparing the dilemmas of same-sex couples to the centuries of discrimination faced by Black Americans is a distortion of our country's culture and history. The disgraces in our nation's history pertaining to the civil rights of Black Americans are unmatched. No other class of individuals, including individuals who are same-sex attracted, have ever been enslaved, or lawfully viewed not as human, but as property. *See, e.g.*, Stacy Swimp, *LGBT Comparison of Marriage Redefinition to Historical Black Civil Rights Struggles is Dishonest and Manufactured* (March 7, 2014), (http://stacyswimp.net/2014/03/07/lgbt-comparison-of-marriage-redefinition-to-historical-Black-civil-rights-struggles-is-dishonest-and-manufactured). Same-sex attracted individuals have never lawfully been forced to attend different schools, walk on separate public sidewalks, sit at the back of the bus, drink out of

separate drinking fountains, denied their right to assemble, or denied their voting rights. *Id.* The legal history of these disparate classifications, *i.e.*, immutable racial discrimination and same-sex attraction, is incongruent. Yet, some judges have mistakenly understated this incongruence to manufacture and mandate the ill-conceived and apparently limitless concept of "marriage equality."

The Hawaii Supreme Court first ruled that a State's failure to promote with so-called "same-sex marriage" violated the State's Equal Rights Amendment. *Baehr v. Lewin*, 74 Haw. 530 (Haw. 1993). This marked the first time a court used the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), to blur the line of a suspect class (race) and a non-suspect class (sexual preference) in Equal Protection Clause analysis.

To understand why this analysis is incorrect, it is essential to understand the holding in *Loving v. Virginia*—that a State's statutory scheme to prevent marriage between a man and a woman on the basis of racial classifications violated the Equal Protection Clause. *Id.* at 11. The plaintiffs in *Loving* were two Virginia residents, a black woman and a white man. *Id.* at 3. The plaintiffs legally married in Washington, D.C. and returned to Virginia. *Id.* Virginia, however, considered interracial marriage a criminal offense, and the plaintiffs were charged and pleaded guilty to violating Virginia's ban on interracial marriage and sentenced to a year in jail. *Id.* The Supreme Court struck down Virginia's ban:

> At the very least, the Equal Protection Clause demands that *racial classifications . . . be subjected to the "most rigid scrutiny,"* . . . and, if

> they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . . . *There is patently no legitimate overriding purpose independent of invidious discrimination which justifies this classification*. . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.

Id. at 10-12 (emphasis added).

Loving was about *racial discrimination*. The *Baehr* Court improperly expanded *Loving* by plucking from its dicta that: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." *Baehr*, 74 Haw. at 562-63 (quoting *Loving*, 388 U.S. at 12). This statement is followed in *Loving*, however, by the *critical qualification* that this fundamental freedom is not to be denied "on so unsupportable a basis as [] *racial classifications*." *Loving*, 388 U.S. at 12 (emphasis added).

The Supreme Court in *Loving* never contemplated, much less addressed, "same-sex marriage." This concept was fully understood and analyzed by the Sixth Circuit Court. App. 48 ("When *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning."). Petitioners ignore this truth and adopt the faulty logic used in *Baehr*. Petitioners wish this Court to assume, without reasoned explanation, that because *racial* discrimination is morally wrong and unconstitutional,

it necessarily follows that a State cannot recognize the historical and moral value that marriage is between a man and woman. *Loving* actually affirmed the foundational institution of marriage—the union of a man and woman, regardless of their race. It did not hold, as *Baehr* erroneously surmised, that marriage is the union of two (or more) people regardless of their gender, co-sanguinity, or any other factor. As the *Baehr* dissent correctly pointed out, "*Loving* is simply not authority for the plurality's proposition that the civil right to marriage must be accorded to same sex couples." *Id.* at 588 (Heen, J., dissenting).

Petitioners misapprehend *Loving's* holding regarding the fundamental right to marriage. Pet. at 14-16, 18-19. Petitioners reiterate a correct statement of the law in the sense that *Loving* affirmed the fundamental constitutional right of a *man and woman to marry* because "[m]arriage [between a man and a woman] is . . . fundamental to our very existence and survival." *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942). But then Petitioners irrationally and unconstitutionally attempt to extend *Loving* and its progeny to create a new federal right of the freedom of choice to marry without any qualification whatsoever. Pet. at 14-16, 18-19. *Loving* emphasized the importance of marriage to all Americans, in the true sense of the word. It did not re-define the word. *See* App. 46-48. So-called "marriage equality" rests on the false premise that all individuals should be allowed to "marry" (actually, to redefine "marriage" to fit their personal desires) because, after all, the right to marry is the fundamental right of all. This is a cynical twisting of the truth. If one redefines "marriage" to means whatever anyone wants it to mean, it has no

definition and is no longer useful as a bearer of meaning.

Loving did not require this destruction of marriage. It did not hold that if prohibited conduct is defined by reference to a proclivity, then that prohibition violates the Equal Protection Clause. *See* S. Girgis, R.P. George, & R.T. Anderson, What is Marriage? 34 Harv. J. L & Pub. Pol'y, 245, 249 (2011) ("antimiscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally related to the latter question"). There is no fundamental right for certain individuals to call their alternative arrangements "marriage"—and to compel others who disagree to not only assent to, but contribute to, the support of that redefined institution. Indeed, such coercion would violate the fundamental right of marriage for those who support marriage's true meaning. *Loving* does not support Petitioners' mindless "marriage equality" slogan, which is ultimately standard-less and renders marriage equally meaningless for all. *Id.* at 269-75.

All States *routinely* require certain qualifications to obtain a marriage license and disallow certain individuals who do not meet those qualifications. States discriminate against first cousins. States discriminate against bigamists, polygamists, pedophiles, sibling couples, parent-child couples, and polyamorists in the licensing of marriage, and it is within the States' rights to do so. *See, e.g.*, Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, National Public Radio: *All Things Considered,* May 27, 2008 (discussing the illegality of polygamy in all fifty States); *Lesbian 'throuple' proves*

Scalia right on slippery slopes, Washington Times Editorial, Apr. 25, 2014, http://www.washingtontimes.com/news/2014/apr/25/editorial-throuple-in-paradise/ (lesbian threesome claim to have married).

Under Petitioners' reasoning, however, such restrictions would no longer be valid. Petitioners urge this Court to discard the long-established proper limits on marriage under State law and, acting as a super-legislature, replace the traditional and rational definition of marriage with one with no discernible limits. If "marriage" means fulfilling one's personal choices regarding intimacy, as Petitioners insist, it is difficult to see how States could regulate marriage on any basis. If personal autonomy is the essence of marriage, then not only gender, but also number, familial relationship, and even species are insupportable limits on that principle, and they all will fall. Petitioners' proposal is not just a slippery slope, it is a bottomless pit.

There are critical differences between race and sexual preference classifications. Race is a suspect class, and racial discrimination triggers strict scrutiny review. In order for a law to survive strict scrutiny, the State interest involved must be more than important—it must be *compelling*. *Loving*, 388 U.S. at 11. And the law itself must be *necessary* in order to achieve the objective. *Id.* If any less discriminatory means of achieving the goal exists, the law will fall. *Id.* It is rare for a law to survive strict scrutiny review.

The Court should review the issue of so-called homosexual marriage not under an implicit or even explicit heightened review, but as any other law that does not involve a suspect class. One's sexual

preference triggers mere rational basis review. App. 31-31; Pet. at 9, 15, 19-21; *Romer v. Evans*, 517 U.S. 620 (1996). A court undertaking rational basis review asks only whether "there is some rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ. v. American Assoc. of University Professors*, 526 U.S. 124, 128 (1999) (*citing Heller v. Doe*, 509 U.S. 312, 319-321 (1993)). It is within a State's right to define marriage between a man and a woman when that licensing restriction passes rational basis review.

Loving does not require a higher standard. *Loving* only employed a higher standard because race is a suspect class, and it counsels the opposite outcome in this case: the protection of our State citizenry's fundamental right of marriage as truthfully defined. The law treats racial classifications as wholly distinct from sexual preference classifications. Here, such different classifications necessarily yield different outcomes. Petitioners' analysis misapplies existing law and heightened sexual preference to the same level of immutable classes, such as race. That conclusion is wrong and void of factual, historical, and legal support. The Sixth Court properly indentified the fatal flaws in Petitioners' arguments. App. 46-48; *see also Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919 (E. D. La. 2014).

II. COURTS SHOULD NOT SUPPLANT THIS NATION'S TRADITIONAL MORALITY WITH THEIR OWN MORAL RELATIVISM.

Petitioners hypocritically ask this Court to eschew considerations of morality when assessing the constitutionality of a State's definition of marriage.

Pet. at 17-19. Petitioners seek to replace the morality of the Judeo-Christian tradition on which our country was founded with the trendy, relativist morality of political correctness.[7] Petitioners claim that this case is a matter of "autonomy." Pet. at 18. But Petitioners reject our Founders' judgment on that issue and just replace it with their own.[8]

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[7] Like any lawgiver, the court cannot avoid the application of morality. *See, e.g.*, Senator Barack Obama, Keynote Address to Sojourners at the 'Call to Renewal' Conference (June 28, 2006) ("Our law is by definition a codification of morality, much of it grounded in Judeo-Christian tradition."). And as the Sixth Circuit stated when analyzing so-called "same-sex marriage" cases, our "[t]radition reinforces the point." App. 31.

[8] *See, e.g.*, What is Marriage, *supra*, at 286 ("there is no truly neutral marriage policy"); Dent, G.W., Jr., Straight is Better: Why Law and Society May Justly Prefer Heterosexuality, 15 Tex. Rev. L. & Pol. 359 (2011) ("Sensible scholars acknowledge that moral neutrality is not only undesirable but impossible."). Robert Reilly more fully explains this disingenuous displacement of morality and tradition:

> The legal protection of heterosexual relations between a husband and wife involves a public judgment on the nature and purpose of sex. That judgment teaches that the proper exercise of sex is within the marital bond because both the procreative and unitive purposes of sex are best fulfilled within it. . . . The legitimization of homosexual relations changes that judgment and the teaching that emanates from it. What is disguised under the rubric of legal neutrality toward an individual's choice of sexual behavior—"equality and freedom for everyone"—is, in fact, a demotion of marriage from something seen as good in itself and for society to just one of the available sexual alternatives. In other words, this neutrality is not at all neutral; it teaches and promotes indifference, where once there was an endorsement.

Amici understand better than many that "tradition" alone cannot justify a law, no matter how hoary its pedigree. But *Amici* do not argue a State's Constitution should remain unmolested by the federal judiciary merely because it upholds long-standing tradition. Contrary to Petitioners' facile analysis, mere "tradition" is not the reason the State marriage definitions here are constitutional. The *reasons* for the tradition are the reasons that the States' laws are constitutional.

Of course, the reasons for the tradition here are entirely rational. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); What is Marriage, *supra*, at 248-259; M. Gallagher, Why Marriage Matters: The Case for Normal Marriage, available at http://marriagedebate.com/pdf/SenateSept42003.pdf; Straight is Better, *supra* at 359, 371-75.

As our tradition recognizes, some truths are self-evident. Among them are that men and women are different. In fact, it is clear from our very existence that men are made for women, and women for men. None of us would be here but for that truth. The Sixth Circuit properly recognized that "[i]t is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative." App. 33.

Reilly, Robert R., Making Gay Okay: How Rationalizing Homosexual Behavior is Changing Everything, 13 (Ignatius Press, 2014).

Another self-evident truth is that it is best for children to be raised by their parents whenever possible. There have been many theories to the contrary throughout history, but they have all proven vacuous. Public policy that recognizes and acts on these truths is not unfairly discriminatory. In fact, the only way to have sound public policy is to build on such truths.

In inviting the Court to redefine "marriage," Petitioners reject these truths. The voters of Michigan, Kentucky, Ohio, and Tennessee, by an overwhelming majority, affirmed a truth upon which our nation was founded and has flourished for over two hundred years: that the natural family is the optimal environment in which children should be raised. Human history, scientific observations of human biology, and our own experience, common sense and reason tell us that children naturally come exclusively from opposite sex unions, and children benefit from being raised by their biological parents whenever possible. *See, e.g.* Straight Is Better, *supra* at 376, 378, 380-81; What is Marriage, *supra* at 258; M. Gallagher, (How) Does Marriage Protect Child Well-Being, in The Meaning of Marriage (R.P. George & J.B. Elshtain, eds.) (Scepter Publishers, Inc., 2010) at 197-212 (*see especially* 208-12 regarding gender roles).

To *Amici* and to most Americans, this federalization and redefinition of marriage directly harms and threatens this sacred and foundational institution. There is no surer way to destroy an institution like

marriage than to destroy its meaning.[9] If "marriage" means whatever a political activist, a cherry-picked plaintiff, or an appointed judge wants it to mean, it means nothing. If it has no fixed meaning, it is merely a vessel for a judge's will. It is a subterfuge for judicial legislation. And as Montesquieu observed: "There is no greater tyranny than that which is perpetrated under the shield of law and in the name of justice." Charles de Montesquieu, Montesquieu's Considerations on the Causes of the Grandeur and Decadence of the Romans, 279 (Jehu Baker trans., Tiberius 1882).

Petitioners improperly urge this Court to overstep its authority and impose *Petitioners'* morality on the thirty-two million citizens of Michigan, Kentucky, Ohio, and Tennessee, usurping the right of each of these States to retain the traditional, truthful meaning of marriage. App. 15. Article V of the Constitution exists for a reason, and that reason is to prevent such radical redefinition of our social contract by non-democratic means. A critical difference exists between interpreting and re-writing the Constitution, and Petitioners want that line crossed. As the Eight Circuit correctly held in *Citizens for Equal Protection v. Bruning*:

> In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has

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[9] Destroying marriage by destroying its meaning is the admitted goal of many "same-sex marriage" advocates. *See, e.g.*, What is Marriage, *supra*, at 277-78 (citing numerous gay activists and supporters who openly advocate the destruction of traditional concepts of marriage and family).

> suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution.

455 F.3d at 870.

Marriage should be reinforced, not redefined. This Court should reject Petitioners' unconstitutional arguments, which undermine the family as the fundamental building block of our society by destroying the meaning of marriage.

III. THE SIXTH CIRCUIT PROPERLY EVALUATED THE FACTUAL RECORD AND CORRECTLY FOUND THAT RESPONDENTS' LEGITIMATE STATE ACTION PASSED RATIONAL BASIS REVIEW

Petitioners assert that the factual record of the trial court makes their case an ideal vehicle for review by this Court. Pet. at 26-27. The factual record, however, is a litany of disputed facts—with the vast majority of the facts weighing in favor of a finding on the behalf of the Respondents.

More critically, however, the Sixth Circuit properly reversed the District Court because the District Court committed reversible error by placing the burden of proof on the state to establish a legitimate government interest. It is not the State's burden, on rational-basis review, to justify the State's traditional definition of marriage. This Court has unequivocally held that "the burden is on the one attacking the legislative arrangement to negate every conceivable basis which

might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (citations and quotations omitted). Although the District Court cited the correct constitutional standard applicable in this case, it thereafter failed to properly apply that burden.

A law is constitutional even if it is "based on rational speculation unsupported by evidence or empirical data." *Id.* at 320. Courts simply do not have "a license . . . to judge the wisdom, fairness, or logic of legislative choices." *Id.* As this Court has elsewhere noted: "The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" *Radice v. People of the State of New York*, 264 U.S. 292, 296 (1924) (citations and quotations omitted).

In matters involving a non-suspect classification, this Court permits both under- and over-inclusiveness in the drafting of such laws. All the state is required to show is that the definition rationally advances a legitimate state interest. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 385 (1947). Because Respondents' current definition of marriage rationally advances the State's interests, *e.g.*, promoting procreation and effective parenting, the Sixth Circuit Court properly rejected Petitioners' Equal Protection claim as a matter of law.

Petitioners argue that the State of Michigan has brought "concrete adverseness to this lawsuit," but then pretends that no factual disputes existed in the District Court claiming that this record was "examined thoroughly" and "may be of assistance to the Court." Pet. at 27. However, in order for the District Court to

reach its iconoclastic conclusions, the District Court turned traditional rational basis review on its head. App. 106, 125-134.

The District Court first offered a series of rationalizations to bolster the factual inadequacies and limitations of Petitioners' expert testimony and to attack the testimony of Respondents' experts. But in the end, the lower court concluded that because the *State* failed to demonstrate a measurable difference in some select child-rearing "outcomes" that the lower court arbitrarily deemed decisive, the millions of citizens who defended Michigan's marriage laws were irrational for not endorsing homosexual conduct as a matter of public policy.

In deciding to redefine marriage for the State, the federal district court held that Michigan voters were *irrational* in affirming a notion upon which our nation was founded and has flourished for over two hundred years: that the natural family is the optimal environment in which children should be raised. App. 127-131.

In rejecting of the convictions of millions of voters, the District Court relied on the testimony of several individuals it deemed "experts" on the issue of child rearing who claimed there is "no difference" between heterosexual and homosexual couples raising children. App. 77, 111, 118, 121, 123, 129. Remarkably, the lower court found all the "experts" supporting the proposition to be "highly" or "fully" credible, and it found all who testified against Petitioners' "no difference" theory to have no credibility at all. *See, e.g.*, App. 77, 79, 109, 111, 113-16, 118, 121, 123, 129.

The District Court failed to provide an adequate basis for its conclusion that this testimony supported the conclusion of "no difference." The District Court never satisfactorily established which criteria were relevant to its inquiry—*i.e.*, which differences matter, and why. The District Court seems to have relied primarily on the testimony of Mr. Brodzinsky in determining that: "What matters is the 'quality of parenting that's being offered' to the child." App. 108. And the court adopted Mr. Brodzinsky's definition of parental quality. App. 108, 109, 111, 127, 129.

But the District Court failed to articulate any "scientific basis" for why certain qualities the "experts" chose and purported to measure are the qualities we as a people must adopt and endorse. What are the so-called experts' qualifications to make moral decisions about what makes for good parenting? The evidence that these social scientists actually measured *those* crucial factors—or are in any way qualified to even identify, much less measure, those factors are nowhere in the record.[10]

Ultimately, these simply are not "scientific" matters. Materialistic science cannot measure the non-

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[10] The experts largely purported to measure one or more facets of children's school performance, which the court then erroneously equated to "healthy development," App. 122, 128; and even that parameter was hardly conclusive in supporting the court's "no difference" thesis, App.128-29. There is no scientific basis for the conclusion that a child's well being is properly determined by checking whether he or she has dropped out of school or been held back a grade at some point. It is a reasonable factor to consider among many others, but not a factor that can "scientifically" be weighed.

material. It cannot define or select morality, values, or the necessary components of a "successful" family, much less measure these factors. It is an injustice and exhibits a gross misreading of the Constitution to install such self-styled "social" experts as the moral compass of the population. Further, these studies fail to demonstrate that an entire State's concept of family and marriage is irrational. Given the fundamental flaws in the District Court's premises and reasoning, its factual findings are unreliable and cannot provide a stable foundation for this Court to make a monumental, nation-wide, permanent change in our marriage laws.

The District Court also stated that "Rosenfeld's study shows that children raised by same-sex couples progress at almost the same rate through school as children raised by heterosexual couples." App. 127. Leaving aside the fact that progress through school is hardly a conclusive measure for an optimal child-rearing environment,[11] this obviously does not "refute" the premise that heterosexual couples make better parents. *See, e.g.*, G.W. Dent, Jr., Straight is Better: Why Law and Society May Justly Prefer Heterosexuality, 15 Tex. Rev. L. & Pol. 359, 371-406 (2011).

The District Court touted Brodzinsky's opinion that "parental gender plays a limited role, if any, in producing well-adjusted children." App. 127. This raises the obvious question of which parent is it that

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[11] When it found it convenient to advance its argument, the court actually admitted that "[o]ptimal academic outcomes for children cannot logically dictate which groups may marry." App. 130.

children can supposedly do without—the mother or the father? Curiously, the court and its experts failed to elucidate this particular point.

These are but a few of the flaws with the lower court's "debate-ending" scientific foray. And under the applicable rational basis review, it is enough for the State to promote natural families merely because natural families provide *some* benefit to the healthy development of our children. *See, e.g., Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). Under our Federal Constitution, a State is entitled to promote what has proven to be the healthiest social structure for the rearing of children and propagation of society, and it is not required to simultaneously promote less healthy alternatives, no matter how popular they might be with certain "social scientists" or federal judges.

Lastly, the Sixth Circuit Court properly rejected Petitioners' heavy-handed push to ignore prudence when implementing a radical social change, especially by judicial decree. App. 14, 31, 33. The Sixth Circuit Court found it rational not to overrule millions of voters and redefine marriage, taking away from the State a right it has held since the inception of our democratic republic. App. 32. The Sixth Circuit properly reversed the factually erroneous and politically-driven opinion of the District Court, which distorted the burden of proof and the factual record in order to legislate, not from the voting booth as the States' voters did, but from the bench.

The Dissent in the Sixth Circuit Opinion raised no legitimate objections to the Majority's exceptional analysis. The gist of the Dissent's lament was: "But

what about the children?" App. 70 (Daughtery, J., dissenting).

Two key passages sufficiently illustrate the futility of the Dissent's objections. First:

> [M]arriage, whether between same-sex or opposite-sex partners, increases stability within the family unit. By permitting same-sex couples to marry, that stability would not be threatened by the death of one of the parents.

App. 82.

If we understand "stability" to mean solely that the death of one parent has less of an adverse impact on the family, then the Dissent's argument more forcefully supports polygamous relationships than same-sex relationships.[12] This is the road to perdition they are on.

Second:

> Even more damning to the defendants' position, however, is the fact that the State of Michigan allows heterosexual couples to marry even if the couple does not wish to have children, even if the

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[12] We believe that the stability of the family unit depends on multiple factors, and is harmed by the gender confusion that an improperly defined family unit can foster, for example. On this latter point, we disagree with both the Dissent and the Majority. *See* App. 33. We understand that governments following proper procedures (such as amending the Constitution) may defy the natural order instantiated in the traditional family by falsely denominating same-sex or other "alternative arrangements" as so-called "marriages" and thus re-invent the family, but they cannot avoid the consequences of that defiance.

> couple does not have sufficient resources or education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts.

App. 82.

This argument ignores the correct legal standard. Over-inclusiveness and under-inclusiveness might not be ideal, but they are permissible in this context. We do not live in an ideal world.

These loosely wound and superficially idealistic arguments are characteristic of the so-called "progressive" agenda that relentlessly attacks our nation's traditional family. They rely exclusively on emotionalism and generalization to blur critical legal distinctions and to impugn foundational institutions as "oppressive." They promise that their alternatives, which either are untested or have proven to be disastrous, will be better for us, and that they must be forced upon us for our own good or "for the children." Fortunately, our Constitution forbids such a tyranny of the minority; and, fortunately, this Court stands as guardian of our Constitution.

CONCLUSION

This Honorable Court should grant the Petition for a Writ of Certiorari and uphold the decision of the U.S. Court of Appeals for the Sixth Circuit that correctly abstained from re-defining the State-approved meaning of marriage. In the alternative, this Honorable Court should deny the Petition.

Respectfully submitted,

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